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FILED
JUN 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07- 1175

In The
Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
PETITIONERS,

v.

THE BROOKLINE SCHOOL DISTRICT,
RESPONDENT.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the First Circuit

SUPPLEMENT TO REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FURTHER REASONS FOR GRANTING THE WRIT

Since the submission of the Petitioners'[1] Reply to the Opposition to Petition of Writ of Certiorari, the United States Court of Appeals for the First Circuit has issued another controversial opinion in the area of Rehabilitation Act and Americans with Disabilities Act law, M.M.R.-Z. v. Puerto Rico, which at once severely undermines the First Circuit's summary affirmance in the present case, upends the principle for which the First Circuit precedent stood, and compels this Court to grant the Writ for Certiorari for the present case as the only way to avoid widespread confusion within the First Circuit and across Circuits. M.M.R.-Z. v. Puerto Rico, No. 07-2025, 2008 U.S. App. Lexis 11977, at *1 (1st Cir. June 5, 2008).

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[1] Petitioners Catherine Burke and Mikael Rolfhamre (the "Parents") are the parents of three children identified by the Brookline School District (the "School District") as students in need of special education under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.). Each of the children is also an individual with a disability under the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12132 et seq.) and a handicapped person as defined by section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794).

Therefore, Petitioners hereby supplement their Reply to Respondent's Opposition Brief, pursuant to Rule 15.8.

I. THE FIRST CIRCUIT'S NEW RULING COMPLETELY UNDERMINES ITS SUMMARY AFFIRMANCE IN THE PRESENT CASE.

Petitioners have consistently maintained that the First Circuit's application of its Diaz-Fonseca precedent to this case is inappropriate not only because Diaz-Fonseca itself constitutes a misreading of the Section 1415(l) that puts the First Circuit at odds with every other Circuit that has decided the question, but also because the issues of fact and law in this case are distinguishable from those addressed by Diaz-Fonseca. Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006).

In Diaz-Fonseca, the First Circuit held that "[w]here the essence of the claim is one stated under the IDEA for denial of FAPE [("free appropriate public education" guaranteed by the IDEA)], no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under . . . Title II of the ADA[] or section 504 of the Rehabilitation Act." Id. at 19.

The First Circuit relied upon Diaz-Fonseca to affirm the dismissal of the Petitioners' Complaint despite the fact that the claims were brought neither "under the IDEA" nor "for the denial of FAPE," but rather for compensatory damages suffered by the Petitioners because of the retaliatory conduct visited

upon them by the School District in clear violation of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

The First Circuit has now flatly contradicted its holding in Diaz-Fonseca. M.M.R.-Z., 2008 U.S. App. Lexis 11977, at *3. M.M.R.-Z. completely undermines the principle upon which the First Circuit originally agreed to summarily affirm the district court in the present case. Id.

In M.M.R.-Z. the court upheld parents' claim to relief under Section 504 and the ADA for damages they suffered on account of retaliation carried out by a school district to prevent them from advocating for their children's rights under the IDEA. Id. In explaining the impact on the defendants' sovereign immunities defenses, the court explained the effect of the Section 1415(l) saving clause:

> We turn now to the defendants' claim that, in addition, sovereign immunity defeats retaliation claims against the Commonwealth and the official capacity defendants based on three other statutes: the ADA, the Rehabilitation Act and Title IX. Defendants argue that Mario's claim based on delay in providing him special education services after Rivera-Lugo's departure is cognizable only under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415, and that the IDEA does not provide for the tort-like damages here sought, Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003);

alternatively, they argue that plaintiffs were required to resort to administrative remedies before pursuing their IDEA-like claim. See 20 U.S.C. § 1415(l). [...]

Although the IDEA preemption claim is thus before us, it lacks merit. IDEA itself provides that

> [n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities.

20 U.S.C. § 1415(l). Thus, on its face IDEA does not preclude claims against the Commonwealth, or the individual defendants, under the ADA, the Rehabilitation Act or (arguably) Title IX as applied to a disabled child.

While we have held that relief under these other statutes is not available where "[p]laintiffs' case turns entirely on the rights created by statute in the IDEA," Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 29 (1st Cir. 2006), here plaintiffs' claim is "independently available through other sources of law," namely, the retaliation provisions of the three statutes here invoked. These claims rest on improper retaliatory intent, are by no means

mirrors of the IDEA, and are not within the rationale of Diaz-Fonseca.

Id. at *8-11.

This decision directly contradicts the First Circuit's summary affirmance of the present action because Petitioners' Complaint does not "turn entirely on the rights created by statute in the IDEA", and the claims are "independently available through other sources of law." Therefore, Petitioners' Complaint does not fall within the rationale of Diaz-Fonseca. The Petitioner's case would survive the motion to dismiss under the now-controlling M.M.R.-Z. holding.

While this Court should grant certiorari to resolve the split within the First Circuit presented by M.M.R.-Z., it must, alternatively, at the very least, remand the present Petition for further consideration in light of this new holding, as the current Petitioners' Complaint fits squarely under M.M.R.-Z.

II. THE NEW RULING COMPLETELY UNDERMINES THE FIRST CIRCUIT'S PRIOR PRECEDENT.

The M.M.R.-Z. holding itself flatly contradicts the Diaz-Fonseca precedent in that it holds that, "Thus, on its face IDEA does not preclude claims against the Commonwealth, or the individual defendants, under the ADA, the Rehabilitation Act or (arguably) Title IX as applied to a disabled child,"

whereas Diaz-Fonseca held that such claims can be barred and refused to recognize the Section 1415(1) savings clause which M.M.R.-Z. cites approvingly as its basis for allowing the parental claims to survive. Id. at *8.

Diaz-Fonseca's admonitions that "where the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under 42 U.S.C. 1983, Title II of the ADA, or section 504 of the Rehabilitation Act" and that "[n]o general compensatory damages may be awarded in such a suit regardless of which of the causes of action listed above [42 U.S.C. 1983, Title II of the ADA, or section 504] is invoked" represented an improper repudiation of the statutory intent of the Section 1415(1). Diaz-Fonseca, 451 F.3d at 19. The case effected an implied repeal of the savings clause, even though such an approach contravened the longstanding principles of statutory construction endorsed by the Court in Posadas v. National City Bank, 296 U.S. 497, 503 (1936) and recently reinforced in Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

Diaz-Fonseca constituted a nullification of Petitioners' rights, and conflicted not only with section 1415(l)'s plain language and legislative history but also with important decisions of this Court.

M.M.R.-Z. now seems to indicate that the First Circuit will recognize the effect of the Section 1415(l) savings clause in some circumstances, but it has not explicitly overruled the implied repeal that Diaz-Fonseca represents.

III. THE PETITIONERS' COMPLAINT WOULD SURVIVE UNDER M.M.R.-Z.

Petitioners' Complaint would survive under the M.M.R.-Z. standard, because it does not "turn entirely on the rights created by statute in the IDEA", and the claims are "independently available through other sources of law." M.M.R.-Z., 2008 U.S. App. Lexis 11977, at *11.

A. Petitioners' Claims Do Not 'Turn Entirely on the Rights Created by Statute in the IDEA'.

Petitioners' claims do not "turn entirely" – or in fact hinge at all – "on the rights created by statute in the IDEA". Id. Plaintiffs' claims are for separate and distinct retaliatory conduct.

Petitioners' pro se Complaint alleges, inter alia, that the School District has discriminated, retaliated, interfered with, coerced, and intimidated Petitioners because of Petitioners' advocacy for their children. It is this retaliatory conduct toward the Parents that is the basis for the compensatory damages claim. Specifically, the Complaint contains highly detailed allegations regarding the School

District's activities against the Parents in response to their advocacy on behalf of their children.

In their Complaint, appellants set forth myriad allegations of occasions when the School District attempted to coerce, intimidate, interfere with, and retaliate against appellants for their advocacy on behalf of their children. Among such contentions were those alleging that the School District: denied procedural safeguards guaranteed by the ADA and Section 504; interfered with appellants' ability to exercise rights secured by the ADA and their right to assist their disabled children in obtaining and enjoying rights secured by both the ADA and Section 504; interfered with access to dispute resolution procedures required by Section 504; and retaliated against the appellants by spreading false and damaging rumors, making excessive and indeed oppressive demands for medical and mental health records, and imposing policies to limit access to independent evaluators.

Even if the School District had provided FAPE to the Petitioners' children, (which the Respondent suggests and the Petitioners deny) this would have no affect on the viability of Petitioners' claims for retaliation under the ADA and Section 504. If the Petitioners had reached their objective in fulfilling their children's right to FAPE from the School District, the Parents would still have a claim for compensatory damages based on retaliation and discrimination under the ADA and Section 504. The claims before this Court are for the harm suffered by the Parents because of the School District's

retaliatory conduct in response to their advocacy. The claims are not predicated on FAPE deprivations.

B. Petitioners' Claims Are 'Independently Available Through Other Sources of Law.'

Petitioners' claims are, as M.M.R.-Z. requires, "independently available through other sources of law." Id. at *11.

The Petitioners are not bringing their claims under the IDEA. They do not base their claims on a denial of FAPE, nor do they seek the kind of relief that could be granted through any IDEA administrative hearing, or through any other education-related injunctive relief. Petitioners were harassed and intimidated as parents and therefore seek monetary relief. Their claims have no counterparts in IDEA, and are brought under the separate and independent causes of action under the ADA and Section 504.

Petitioners allege their injuries under Title V of the ADA, which prohibits retaliation, interference, coercion, or intimidation. 42 U.S.C. § 12203. Petitioners allege that they suffered this discrimination because they opposed the unlawful actions taken by the School District. The harm of which the Petitioners complain is based on the acts covered by local government action and public accommodation provisions of the ADA, at Titles II and III.

Section 504 of the Rehabilitation Act which prohibits discrimination and exclusion from federally funded programs. 29 U.S.C. § 794. Petitioners' claim that the harassment, discrimination, and other actions carried out against them by the School District violated their civil rights under this Section.

These violations are closely akin to the kind of retaliation described in M.M.R.-Z. Id. at *2 ("Mario, together with his parents and grandmother, then filed suit in federal district court based on the abuse he suffered and the alleged deprivation of educational services in the year-long period following Rivera-Lugo's termination").

The only difference is that the Petitioners in the current action have gone *further* to meet their burden than did the plaintiffs in M.M.R.-Z., whose claim was allowed to reach summary judgment: "In opposing summary judgment on the retaliation claim, the plaintiffs baldly asserted that the delay in furnishing services was based on retaliatory animus but without citing *any* evidence in the record to support such an assertion." Id. at *6-7. (emphasis in the original). Here, Petitioners' Complaint includes substantive details of the situations in question, and, should this Writ of Certiorari be granted and Petitioners be allowed to reach the merits, would provide strong evidence of the claims they allege.

While this Court should grant certiorari to resolve these contradictory rulings, Petitioners request, in the alternative, that the present Petition

be remanded to the First Circuit for further proceedings based on the holding of M.M.R.-Z..

IV. THE COURT MUST CLARIFY THESE UNRESOLVED QUESTIONS OF LAW.

Unless this Court grants the Petition for Writ of Certiorari to resolve these discrepancies, M.M.R.-Z. will be the first of many ad hoc attempts, both within the First Circuit and outside it, to try to sidestep Diaz-Fonseca. Such confusion will lead to disparate treatment of parents who happen to bring their claims in different judicial Circuits.

Because M.M.R.-Z. v. Puerto Rico, has contradicted direct First Circuit precedent in Diaz-Fonseca, and because Diaz-Fonseca already refuses to recognize the statutory effect of Section 1415(l), this Court must resolve the conflict between the First Circuit, the intent of Congress, and its sister Circuits. Unless the Court rejects the present summary affirmance under Diaz-Fonseca, the First Circuit will maintain an unique and unfairly burdensome standard for the parents of disabled children who have been retaliated against by school districts, and Petitioners' claim will have been improperly dismissed in light of M.M.R.-Z.

CONCLUSION

For these reasons, and especially in light of this new holding from the First Circuit, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to review the questions presented in this appeal.

Dated: June 11, 2008

Respectfully submitted,

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